



3. According to Oklahoma, poultry litter is a public health hazard, poses an imminent and substantial endangerment to the public, and requires this Court to issue an injunction preventing the future use of poultry litter as a fertilizer by Arkansas citizens in the Arkansas portion of the Illinois River watershed.

4. For the reasons set forth below, Arkansas is concerned that the Court is being asked to issue a ruling that may conflict with longstanding federal law, environmental statutes promulgated by the Arkansas General Assembly, and environmental programs administered by the Arkansas Department of Environmental Quality (“ADEQ”) and the Arkansas Natural Resources Commission (“ANRC”).

#### **Arkansas’ Interest**

5. Arkansas has great interest in Oklahoma’s request for an injunction for at least two reasons. First, Oklahoma seeks to enjoin the actions of Arkansans who are not parties to this case. Specifically, many Arkansans in the Illinois River Watershed use chicken litter as agricultural fertilizer in pursuit of their livelihood. Second, those Arkansans use the litter in compliance with Arkansas law. If Oklahoma’s request for injunction is granted, Arkansans will be restrained from carrying on activities that comply with Arkansas law. In short, by granting Oklahoma’s motion this Court will cripple one of Arkansas’ largest industries and will nullify Arkansas statutory and regulatory law. For these reasons, Arkansas should be given the opportunity to present its position on Oklahoma’s request, which will in part include the arguments below.

#### **Arkansas’ Solid Waste Regulatory Scheme**

6. The Arkansas General Assembly established a comprehensive statutory scheme for regulating solid waste disposal based upon a legislative determination that the collection and

disposal of solid waste must be accomplished in a manner that will protect public health, prevent water and air pollution, prevent the spread of disease and the creation of nuisances, and conserve natural resources. Ark. Code Ann. § 8-6-202.

7. The collection, transportation, transfer, processing and disposal of solid waste in Arkansas is regulated under the provisions of the Arkansas Solid Waste Management Act (“ASWMA”) and Arkansas Pollution Control and Ecology Commission (“Commission”) Regulation No. 22. Ark. Code Ann. §§ 8-6-201 *et seq.*

8. The Commission’s Regulation No. 22 is based on, and has incorporated, Title 40 Code of Federal Regulations (“CFR”) Part 257 and Part 258. CFR Part 257 and Part 258 were promulgated under Subtitle D of RCRA. After the Commission adopted Regulation No. 22, the United States Environmental Protection Agency formally approved Arkansas’ solid waste management program.

9. The ASWMA grants ADEQ the authority to issue permits to all solid waste disposal sites and disposal facilities, and requires all individuals in Arkansas to dispose of solid waste at a site or facility permitted by the ADEQ. Ark. Code Ann. § 8-6-205. ADEQ applies RCRA definitions, and definitions arising under CFR Part 257 and Part 258, in determining whether or not a material is a “solid waste.”

10. ADEQ has never regulated poultry litter, when used as a fertilizer, as a solid waste under RCRA or the ASWMA because it is commonly a commodity in Arkansas that is used as a soil amendment. Additionally, poultry litter is bought, sold and bartered. Because EPA has approved ADEQ’s solid waste management program, the State believes that EPA shares the view that poultry litter is not a RCRA solid waste when used as a fertilizer.

11. RCRA defines “solid waste” as “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility **and other discarded material**, including solid, liquid, semisolid, or contained gaseous material . . . .” 42 U.S.C. § 6903(27) (emphasis added). RCRA does not define the term “discarded material.”

12. Because RCRA does not define the term “discarded material,” other district courts have looked to the dictionary definition of “discard” and determined that they should apply the common usage of “discard” when interpreting RCRA’s “discarded materials” language. The common dictionary definition of discard is to cast aside, reject or abandon. *American Mining Congress v. U.S. EPA*, 824 F.2d 1177 (D.C. Cir. 1987). Arkansas believes the use of poultry litter as a fertilizer fails to meet the RCRA definition of a “discarded material” and is not a solid waste for purposes of RCRA.

13. Legislative history also reinforces the conclusion that use of poultry litter as a fertilizer is not a material that Congress intended to regulate under RCRA. The RCRA House Report indicates that Congress was concerned with waste products of all types that were contributing to diminishing landfill capacity, and the parallel need for increased landfill space. According to the Committee:

The words solid waste are laden with false connotations. They are more narrow in meaning than the Committee’s concern. The words discarded materials more accurately reflect the Committee’s interest. H.R.Rep. No. 94-1491, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238-39.

In enacting RCRA, Congress also declared that agricultural products that could be reused as fertilizers were not its concern. The same House Report stated, “[m]uch industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses . . . . Agricultural wastes which are returned

to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.” *Id.* at 3, *reprinted in* 1976 U.S.C.C.A.N. at 6239-41.

14. Simply put, poultry litter used as a fertilizer is not a “discarded material,” and it is not a “solid waste” as defined under RCRA and the ASWMA. By the same token, poultry litter that is sold or bartered is not a “discarded material” that can be regulated under RCRA or Arkansas law.

15. Granting Oklahoma’s request for preliminary injunction requires this Court to find that poultry litter is indeed a solid waste under RCRA.

16. The impacts from such a ruling will not be limited to the Arkansas portion of the Illinois River watershed. If this Court holds that poultry litter is a RCRA solid waste in the Illinois River watershed, it is a RCRA solid waste in every corner of Arkansas. It will require Arkansas to ensure that poultry litter be disposed of in a permitted disposal site or at a permitted facility, a result that Arkansas is ill-equipped, both from a regulatory perspective, and from a landfill capacity perspective, to comply with. A decision by this Court that the use of poultry litter as a fertilizer is an illegal disposal of a solid waste under RCRA would turn Arkansas’ EPA approved solid waste program on its head.

#### **Arkansas’ Nutrient Management Program**

17. In 2003, the Arkansas General Assembly addressed the environmental effects of surplus nutrients by designating certain geographic areas within the Illinois River Watershed as “nutrient surplus areas” subject to nutrient-management plans designed to protect water quality. *See* Ark. Code Ann. §§ 15-20-901, *et seq.* (Arkansas Poultry Feeding Operations Registration Act); Ark. Code Ann. §§ 15-20-1101, *et seq.* (Arkansas Soil Nutrient Application and Poultry

Litter Utilization Act); Ark. Code Ann. §§15-20-1114 (governing potential conflicts between land application of poultry litter and Arkansas water and air pollution control laws).

18. The Arkansas Natural Resources Commission subsequently adopted rules and regulations to implement this legislation. These regulations attempt to balance Arkansas' interest in protecting the Illinois River watershed from the adverse effects of excess nutrients with competing interests in maximizing the use of poultry litter as a fertilizer.

19. If this Court grants Oklahoma's request and issues an injunction completely prohibiting the use of poultry litter as a fertilizer in Arkansas' portion of the Illinois River watershed, it will eviscerate the primary reason why the Arkansas General Assembly promulgated Ark. Code Ann. §§ 15-20-901, *et seq.*, Ark. Code Ann. §§ 15-20-1101, *et seq.* and Ark. Code Ann. §§15-20-1114 and ultimately vacate these legally adopted Arkansas programs.

20. For these reasons, and others not fully addressed in this Motion, Arkansas respectfully requests leave to file an Amicus Brief in this case.

WHEREFORE, the above premises considered, the State of Arkansas respectfully requests that this honorable Court issue an order:

- A. Granting Arkansas' Motion and allowing the State to file an Amicus Brief in this case; and
- B. Grant all such further relief as the Court deems just and equitable

Respectfully submitted,

DUSTIN McDANIEL  
Attorney General

By: /S/ Justin Allen  
JUSTIN ALLEN, AR Bar No. 99112  
Chief Deputy Attorney General  
CHARLES L. MOULTON, AR Bar No. 91105  
Sr. Assistant Attorney General  
KENDRA AKIN JONES, AR Bar No. 2004214  
Assistant Attorney General  
323 Center Street, Suite 200  
Little Rock, Arkansas 72201-2610  
(501) 682-2007

**COUNSEL FOR THE STATE OF ARKANSAS**

### CERTIFICATE OF SERVICE

I certify that on the 6<sup>th</sup> of December 2007, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic filing to the following ECF registrants:

W.A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	Kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	Trevor_hammons@oag.state.ok.us
Robert D. Singletary	<u>Robert_singletary@oag.state.ok.us</u>
Daniel Lennington, Assistant Attorney General	Daniel_lennington@oag.ok.gov

Douglas Allen Wilson	doug_wilson@riggsabney.com
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	

Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
Riggs Abney	

J. Randall Miller	rmiller@mkblaw.net
David D. Page	dpage@mkblaw.net
Louis W. Bullock	lbullock@mkblaw.net
Miller Keffner & Bullock	

Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth Claire Xidis	exidis@motleyrice.com
Motley Rice	

#### **COUNSEL FOR PLAINTIFFS**

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	

Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Sidley Austin LLP	

Robert W. George	robert.george@kutakrock.com
Michael R. Bond	michael.bond@kutakrock.com
Erin Walker Thompson	erin.thompson@kutakrock.com
Kutak Rock LLP	



**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.,  
AND COBB-VANTRESS, INC.**

R. Thomas Lay  
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin  
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

**COUNSEL FOR WILLOW BROOK FOODS, INC.**

Robert P. Redemann  
Lawrence W. Zeringue  
David C. Senger  
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

rredemann@pmrlaw.net  
lzingue@pmrlaw.net  
dsenger@pmrlaw.net

Robert E. Sanders  
E. Stephen Williams  
Young Williams, P.A.

rsanders@youngwilliams.com  
steve.williams@youngwilliams.com

**COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.**

George W. Owens  
Randall E. Rose  
The Owens Law Firm, P.c.

gwo@owenslawfirmpc.com  
rer@owenslawfirmpc.com

James M. Graves  
Gary V. Weeks  
Bassett Law Firm

jgravdes@bassettlawfirm.com

**COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.**

John R. Elrod  
Vicki Bronson  
Bruce W. Freeman  
Conner & Winters, LLLP

jelcod@cwlaw.com  
vbronson@cwlaw.com  
bfreeman@cwlaw.com

**COUNSEL FOR SIMMONS FOODS, INC.**

John H. Tucker  
Colin H. Tucker  
Theresa Noble Hill  
Leslie Jane Southerland  
Rhodes, Hieronymus, Jones, Tucker & Gable

jtuckercourts@rhodesokla.com  
chtucker@rhodesokla.com  
thillcourts@rhodesokla.com  
lsoutherland@rhodesokla.com

Terry W. West  
The West Law Firm

terry@thewestlawfirm.com

Delmar R. Ehrich  
Bruce Jones  
Krisann Kleibacker Lee  
Todd Walker  
Faegre & Benson LLP

dehrich@faegre.com  
bkpmes@faegre.com  
kklee@faegre.com  
twalker@faegre.com

**COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC**

A. Scott McDaniel	<a href="mailto:smcdaniel@mcdaniel-lawfirm.com">smcdaniel@mcdaniel-lawfirm.com</a>
Phillip D. Hixson	<a href="mailto:phixson@mcdaniel-lawfirm.com">phixson@mcdaniel-lawfirm.com</a>
Nicole M. Longwell	<a href="mailto:nlongwell@mcdaniel-lawfirm.com">nlongwell@mcdaniel-lawfirm.com</a>
Craig Mirkes	<a href="mailto:cmirkes@mhla-law.com">cmirkes@mhla-law.com</a>
McDaniel, Hixson, Longwell & Acord, PLLC	

Sherry P. Bartley	<a href="mailto:sbartley@mwsgw.com">sbartley@mwsgw.com</a>
Mitchell Williams Selig Gates & Woodyard	
<b>COUNSEL FOR PETERSON FARMS</b>	

Michael D. Graves	<a href="mailto:mgraves@hallestill.com">mgraves@hallestill.com</a>
D. Kenyon Williams, Jr.	<a href="mailto:kwilliams@hallestill.com">kwilliams@hallestill.com</a>
<b>COUNSEL FOR POULTRY GROWERS</b>	

Carrie Griffith	<a href="mailto:griffithlawoffice@yahoo.com">griffithlawoffice@yahoo.com</a>
<b>COUNSEL FOR RAYMOND C. AND SHANNON ANDERSON</b>	

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert	Thomas C. Green
Secretary of the Environment	Sidley Austin Brown & Wood LLP
State of Oklahoma	1501 K Street NW
3800 North Classen	Washington, DC 20005
Oklahoma City, OK 73118	<b>COUNSEL FOR TYSON FOODS, INC.</b>
<b>COUNSEL FOR PLAINTIFFS</b>	<b>TYSON POULTRY, INC., TYSON</b>
	<b>CHICKEN, INC.; AND COBB-VANTRESS</b>